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No. 03-642

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., AND COLORADO PERMANENTE MEDICAL GROUP, P.C.,

Petitioners,

v.

KAREN PACHECO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
A. Respondent Fails To Distinguish The HCAA From The Statutes At Issue In *Crawford*, *Hart*, and *Orion*, None Of Which Is Specifically Directed At Insurers	3
B. Respondent Fails To Refute The Confusion And Uncertainty Surrounding The Proper Test For Applying The First Clause Of Section 2(b) Of The McCarran-Ferguson Act	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES Page

American Bankers Ins. Co. of Fla. v. *Crawford*, 757 So. 2d 1125 (Ala. 1999) 3, 6, 7
Continental Ins. Co. v. *Equity Residential Props. Trust*, 565 S.E.2d 603 (Ga. Ct. App. 2002) 6
Cox v. *Woodmen of the World Ins. Co.*, 556 S.E.2d 397 (S.C. Ct. App. 2001) 6
Hamilton Life Ins. Co. of N.Y. v. *Republic Nat'l Life Ins. Co.*, 408 F.2d 606 (2d Cir. 1969) 3
Hart v. *Orion Ins. Co.*, 453 F.2d 1358 (10th Cir. 1971) 3
Imbler v. *PacifiCare of Cal., Inc.*, 103 Cal. App. 4th 567 (2002) 6
Kentucky Ass'n of Health Plans, Inc. v. *Miller*, 538 U.S. 329, 123 S. Ct. 1471 (2003) 2, 5
Mutual Reinsurance Bureau v. *Great Plains Mut. Ins. Co.*, 969 F.2d 931 (10th Cir. 1992) 6
Smith v. *PacifiCare Behavioral Health of Cal., Inc.*, 93 Cal. App. 4th 139 (2001), *cert. denied*, 537 U.S. 818 (2002) 6
Standard Sec. Life Ins. Co. of N.Y. v. *West*, 267 F.3d 821 (8th Cir. 2001) 6
Union Labor Life Ins. Co. v. *Pireno*, 458 U.S. 119 (1982) 1
United States Dep't of Treasury v. *Fabe*, 508 U.S. 491 (1993) 4, 7

REPLY BRIEF

The Colorado Supreme Court has determined that the McCarran-Ferguson Act saves state laws that restrict an insurer's use of arbitration from preemption under the Federal Arbitration Act ("FAA"), even if the state law is not specifically directed at insurers. As a result, the Colorado Supreme Court has gone further than any other court to date in permitting states to restrict the use of arbitration in insurance contracts. The petition demonstrates that the Colorado Supreme Court's decision conflicts with decisions of the Alabama Supreme Court and the Second and Tenth Circuits, which hold that the McCarran-Ferguson Act does not save state anti-arbitration statutes that are not specifically directed at insurers.

The petition also demonstrates substantial disagreement about whether, at a more fundamental level, state law that restricts the use of arbitration can ever properly be deemed to regulate the business of insurance. The Colorado Supreme Court held that it could, because restrictions upon arbitration, in its view, "further the interests of . . . policyholders." Pet. App. 16a. But other courts have concluded that a different set of factors, namely those set forth in *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982), should be addressed in determining whether any given state statute regulates the business of insurance. Had the Colorado Supreme Court faithfully applied the *Pireno* factors, it would have concluded, as the Alabama Supreme Court did, that a state statute that restricts the use of arbitration in insurance contracts does not regulate the "business of insurance" within the meaning of the first clause of section 2(b) of the McCarran-Ferguson Act. See Pet. 18-19.

By expressly refusing to apply the *Pireno* factors to a case arising under the first clause of section 2(b) (Pet. App. 14a n.8), the Colorado Supreme Court exacerbated a mature

conflict over the proper test for determining whether a state law has been enacted "for the purpose of regulating the business of insurance" under the first clause of section 2(b) of the McCarran-Ferguson Act. Although the Colorado Supreme Court cited this Court's decision last Term in *Kentucky Association of Health Plans, Inc.* v. *Miller*, 538 U.S. 329, 123 S. Ct. 1471 (2003), as grounds for abandoning any consideration whatsoever of *Pireno* in first clause cases, the Colorado Supreme Court concomitantly ignored the test that this Court set forth to replace consideration of the *Pireno* factors. Instead, it adopted a broad new test that no other court has applied, and that, as the dissenting Justices rightly noted, allows the McCarran-Ferguson Act's limited savings clause to "swallow federal preemption under the Supremacy Clause." Pet. App. 28a.

The decision below thus confirms the need for a clear statement from this Court, comparable to that provided last Term for ERISA in *Kentucky Association*, of how lower courts are to determine whether a state statute is one "enacted for the purpose of regulating the business of insurance" within the meaning of the first clause of section 2(b) of the McCarran-Ferguson Act. The significance of the issue presented is plain. As the *amicus* briefs filed by the Reinsurance Association of America, the American Association of Health Plans, the Civil Justice Association of California and the California Chamber of Commerce make clear, the insurance industry relies heavily on arbitration to resolve disputes efficiently and economically. In instances where parties resort to arbitration, successful claimants receive quicker payments, and the resources saved by avoiding conventional litigation permits insurance companies to offer more comprehensive coverage at lower cost. Accordingly, it is of vital importance to the insurance industry that insurers be able to predict the enforceability of such restrictions. Yet under current law, in which state and federal courts apply different legal standards, insurers do not know

whether their agreements to arbitrate, though lawful under the FAA, will be deemed unenforceable in light of state law.

Each of the considerations by which this Court traditionally evaluates a petition for writ of certiorari thus supports a grant of the petition. Respondent's efforts to distinguish the decisional conflicts are unpersuasive.

A. Respondent Fails To Distinguish The HCAA From The Statutes At Issue In *Crawford*, *Hart*, and *Orion*, None Of Which Is Specifically Directed At Insurers.

Respondent argues that the anti-arbitration statutes at issue in *American Bankers Insurance Co. of Florida* v. *Crawford*, 757 So. 2d 1125 (Ala. 1999), *Hamilton Life Insurance Co. of New York* v. *Republic National Life Insurance Co.*, 408 F.2d 606, 611 (2d Cir. 1969), and *Hart* v. *Orion Insurance Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971) are distinguishable from the HCAA because those statutes apply generally to all contracts, while the HCAA applies only to contracts with health care providers for medical services. Opp. 7-8. The distinction is one without a difference. Neither the HCAA nor the statutes at issue in *Crawford*, *Hamilton*, and *Hart* is specifically directed toward insurers. Pet. 13-14. The Colorado Supreme Court found that the HCAA arbitration restrictions were saved because they "directly regulate" (Pet. App. 15a) insurance contracts. But the Alabama Supreme Court and the Second and Tenth Circuit found that such direct regulation of insurance contracts was not enough. Indeed, the Alabama Supreme Court reached that conclusion even though Alabama's general anti-arbitration statute was incorporated by reference into the Alabama insurance code. *Crawford*, 757 So. 2d at 1136. As the dissenting Justices noted below, the HCAA is in all material respects "a law of general application," and the Colorado Supreme Court therefore should have followed the lead of these other courts. Pet. App. 27a. Its failure to do so alone warrants review by this Court.

Respondent then argues that the HCAA regulates the "business of insurance" because when applied to disputed claims it has a "substantial effect upon the insurer-insured relationship." Opp. 9. The plain language of Section 2(b), however, covers only state statutes enacted with the "purpose" – and not merely the "effect" – of regulating the business of insurance. And in any event, if the McCarran-Ferguson Act did save any state law that has a "substantial effect" upon insurance contracts, there should be no difference in its application here and in *Crawford*, *Hamilton*, and *Hart*, since the statutes in these cases all have the same effect (substantial or not) on insurance contracts. Respondent's "substantial effects" argument does nothing to distinguish those cases.

Respondent also argues that in *United States Department of Treasury* v. *Fabe*, 508 U.S. 491 (1993), this Court acknowledged that a state statute may have multiple purposes, and held that so long as one of the purposes is to regulate the business of insurance, the first clause of section 2(b) is satisfied. Opp. 9. Respondent misconstrues *Fabe*. In *Fabe*, the Court merely observed that different provisions within the same broad statute could have different purposes. The Court did not hold that a single provision that made no express reference to regulating insurers, and that was not specifically directed at insurers, could nevertheless be deemed a provision enacted for the purpose of regulating the business of insurance. See *Fabe*, 508 U.S. at 509-10.

Respondent thus fails to distinguish the threshold conflict presented here: To be a law enacted "for the purpose of regulating the business of insurance," must the law be specifically directed at insurers? The distinctions that respondent attempts to draw between the HCAA and the statutes in *Crawford*, *Hamilton*, and *Hart* are only semantic. None of these cases involves a state law specifically directed at insurers. This Court should grant review to resolve the

conflict between these decisions, and clarify the legal standards for interpreting the McCarran-Ferguson Act.

B. Respondent Fails To Refute The Confusion And Uncertainty Surrounding The Proper Test For Applying The First Clause Of Section 2(b) Of The McCarran-Ferguson Act.

The foregoing conflict is sufficient to justify granting the petition. But plenary review is also warranted to address whether state arbitration restrictions, even if specifically directed at insurers, may be deemed to be laws for the purpose of regulating the business of insurance. Not only is this question unsettled, but so is the test to be applied in attempting to answer it. See Pet. 15-19 & nn.2-4. The significant and acknowledged confusion in the lower courts regarding the applicable test for applying the first clause of section 2(b) of the McCarran-Ferguson Act is an additional and important reason to grant the petition.

Respondent does not deny that the lower courts are divided over the applicability of the *Pireno* factors in cases involving the first clause of section 2(b) of the McCarran-Ferguson Act. Nor does respondent deny that this Court's decision last Term in *Kentucky Ass'n*, 123 S. Ct. at 1479, compounded that confusion by making a "clean break" from the *Pireno* factors in evaluating whether state laws "regulate insurance" under ERISA. Pet. 19-20. The Colorado Supreme Court evidently concluded that this Court's rationale for rejecting the *Pireno* factors in the context of ERISA's saving clause applies with equal force to the first clause of section 2(b) of the McCarran-Ferguson Act. Pet. App. 14a n.8. Yet the Colorado Supreme Court replaced the *Pireno* factors with a new test that is wholly untethered to the plain language of section 2(b).

Respondent neither defends the Colorado Supreme Court's new test nor denies that it compounds the confusion in the lower courts over the proper test. Respondent instead

advances two related arguments as to why this case is not the best vehicle for addressing that confusion.

First, Respondent argues that this case is unique because "[m]any, if not most, of the cases" involving confusion over the proper test for applying section 2(b) "do not directly concern the actual performance or enforcement of a particular provision of an insurance contract." Opp. 5. This is not true. Numerous state and federal cases involving the application of the *Pireno* factors have arisen in the context of an underlying dispute over the enforcement of an arbitration provision in an insurance contract. See, *e.g.*, *Crawford*, 757 So. 2d at 1133; *Standard Sec. Life Ins. Co. of N.Y.* v. *West*, 267 F.3d 821, 823-24 (8th Cir. 2001) (per curiam); *Mutual Reinsurance Bureau* v. *Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933 (10th Cir. 1992).[1] This case is thus an entirely suitable vehicle to use in addressing the vitality of the *Pireno* factors in cases arising under the first clause of section 2(b).

Second, respondent argues that the conflict in the lower courts over the application of the *Pireno* factors is irrelevant here, because any case involving the enforceability of a term in an insurance agreement is *necessarily* one involving "the business of insurance." Opp. 3. That proposition is unprecedented, and was squarely rejected by the court in *Crawford*. Far from supporting the denial of the petition, respondent's resort to such a new and expansive proposition to defend the decision below underscores the need for this Court's review.

Respondent maintains that under *Fabe*, "consideration of the *Pireno* factors in a case concerning the actual performance of an insurance contract 'would be mere

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[1] *See also Smith* v. *PacifiCare Behavioral Health of Cal., Inc.*, 93 Cal. App. 4th 139, 152-62 (2001), *cert. denied*, 537 U.S. 818 (2002); *Imbler* v. *PacifiCare of Cal., Inc.*, 103 Cal. App. 4th 567, 571-77 (2002); *Continental Ins. Co.* v. *Equity Residential Props. Trust*, 565 S.E.2d 603, 603-05 (Ga. Ct. App. 2002); *Cox* v. *Woodmen of the World Ins. Co.*, 556 S.E.2d 397, 399-402 (S.C. Ct. App. 2001).

formalism,' since all three prongs of *Pireno* are satisfied when the issue concerns the performance or enforcement of the insurance contract." Opp. 5. But in *Fabe*, the Court was acknowledging only that the business of insurance is implicated when there is a failure altogether to perform an insurance contract, because that would prevent the transfer of risk between insurer and insured. *Fabe*, U.S. at 503-04.

By contrast, the enforceability of an arbitration provision does not affect whether claimants will recover on their claims, and hence does not affect the transfer of risk between insurer and insured. See Pet. 18-19. The enforcement of an arbitration provision also does not "regulate, constrain, set benefits, exclusions or limitations that [a]ffect the relationship between the insurer and the policyholders." Pet. App. 26a. The enforcement of an arbitration provision thus affects only the process and procedures by which a claimant seeks relief, *not* the actual performance of the agreement. It is akin to enforcement of a choice-of-law provision, integration clause, or other common term of a contract, the enforceability of which has no nexus to the business of insurance. See Pet. 19; Pet. App. 26a; *Crawford*, 757 So. 2d at 1130-36.

Respondent's proposed new test is thus vastly overbroad. If every state law that affects the enforcement of any provision in an insurance contract also "regulat[es] the business of insurance," then there would no longer be any difference between the "business of insurance" and the business of insurance *companies*. Cf. Opp. 6 n.3. Neither this Court in *Fabe*, nor any lower court, has yet reached that conclusion. Like the decision below, respondent's broad reading of the McCarran-Ferguson Act would also permit it to "swallow federal preemption," and hence does nothing to undercut the need for this Court's review. Pet. App. 28a.

Respondent has failed to rebut petitioners' showing that the factual context of this case is an appropriate one in which to resolve the question presented. Respondent also does not dispute that there is manifest confusion in the lower courts

over the standard for applying the first clause of section 2(b) and has advanced no meaningful distinction of the Alabama Supreme Court's decision in *Crawford*. Whether the McCarran-Ferguson Act grants courts free reign to enforce state anti-arbitration laws against insurers is an issue of national importance that this Court should now resolve.

CONCLUSION

For the forgoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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